

August 2, 2005

*Filed via ECFS*

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: ***Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands***  
**WT Docket No. 03-66**  
**Written Ex Parte Presentation**

Dear Ms. Dortch:

Luxon Wireless Inc. ("Luxon") hereby opposes the Petition for Extraordinary Relief ("Petition") filed July 14, 2005 by The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. ("IMWED") in the above-captioned proceeding.<sup>1</sup> Apparently believing that its numerous requests for Commission micromanagement of private leasing relationships gain in substance or credibility through repetition, IMWED asks the Commission to require EBS licensees to submit for public inspection unredacted copies of all leases entered into between January 10, 2005 and July 10, 2005. In support of its claim that such oversight is warranted, IMWED uses as an example a capacity lease between Clarendon Foundation and a Sprint Corporation subsidiary ("Sprint") that *fully complies with Commission rules*, suggesting through innuendo and conjecture that there is a problem that its proposed remedy will solve. Through this approach, IMWED undercuts its own position, both generally in the context of its petition for reconsideration<sup>2</sup> and specifically in relation to the request in its Petition. The Petition should be summarily dismissed.

Luxon fully supports the well-articulated response filed on July 27, 2005 by the Wireless Communications Association International, Inc. ("WCA").<sup>3</sup> As a new entrant that has recently entered into several spectrum lease agreements with EBS licensees, Luxon writes separately to emphasize the direct and adverse effect that would result if its

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<sup>1</sup> Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-135, 19 FCC Rcd 14165 (2004) ("*BRS/EBS Order*").

<sup>2</sup> See Petition of The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. for Reconsideration, WT Docket No. 03-66, filed January 10, 2005.

<sup>3</sup> See Letter from Paul J. Sinderbrand dated July 27, 2005, WT Docket No. 03-66 ("WCA Letter").

EBS lessors were required to submit to the Commission unredacted copies of leases that reflect sensitive and confidential elements of Luxon's business plan. To be sure, IMWED's "solution" – to a problem that does not exist – would have a harmful effect on the ability of entrepreneurs and EBS licensees to negotiate leases that meet their respective interests.

### ***Introduction***

Luxon was established in 2003 to deploy and commercially operate high-quality, carrier-grade wireless broadband services in the state of Florida and other areas. As a "true start-up" enterprise, Luxon focuses on serving residences and commercial businesses that are underserved or unserved by wired solutions such as DSL or cable modem. During the first six months of this year, in many cases following a competitive process with knowledgeable and forward-thinking educators,<sup>4</sup> Luxon successfully secured long-term lease rights with EBS licensees in five markets across the Florida panhandle, markets where established companies such as Nextel also have EBS and BRS rights.

In its opposition to certain petitions for reconsideration of the *BRS/EBS Order*,<sup>5</sup> Luxon asked the Commission to reject a number of IMWED's proposals, including its request to require EBS licensees to submit unredacted copies of their lease agreements to the Commission. Luxon stated that IMWED's proposal "is at odds with the secondary market rules requiring lessors and lessees to certify compliance with numerous rules" and "is antithetical to the Commission's efforts to streamline the spectrum leasing process."<sup>6</sup> Numerous other participants made the same arguments.<sup>7</sup>

### ***Discussion***

Apparently not content to have the policy arguments in its Petition for reconsideration considered in their normal context, IMWED's latest tact targets those licensees and operators that have recently entered into EBS spectrum leases. As noted

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<sup>4</sup> Luxon strongly objects to the Media Access Project's characterization that EBS licensees are "weak and unsophisticated." Letter from Harold Feld dated July 18, 2005, WT Docket No. 05-63, at 1. To Luxon's knowledge, Media Access Project has not engaged in lease negotiations with any EBS licensees, and as such, its statement is unsubstantiated and irresponsible. In Luxon's experience negotiating EBS capacity leases over the last two years, EBS licensees bargain diligently for lease terms that are important to their educational mission, such as access to additional advanced wireless services (*e.g.*, video-on-demand, campus intranets, end user locations), increased compensation and equipment rights.

<sup>5</sup> See Luxon's Consolidated Opposition to Petitions for Reconsideration filed February 22, 2005. ("Opposition").

<sup>6</sup> *Id.* at 6.

<sup>7</sup> See, *e.g.*, Consolidated Opposition of WCA, WT Docket No. 03-66, filed February 22, 2005, at 36; Consolidated Opposition of Sprint Corporation to Petitions for Reconsideration, WT Docket No. 03-66, filed February 22, 2005, at 2; Consolidated Opposition of Nextel Communications to Petitions for Reconsideration, WT Docket No. 03-66, filed February 22, 2005, at 14-19; Consolidated Opposition of BellSouth Corporation, *et al.*, WT Docket No. 03-66, filed February 22, 2005, at 13; Opposition of Clearwire Corp. to Petitions for Reconsideration, WT Docket No. 03-66, filed February 22, 2005, at 2 n.2; Consolidate Opposition of C&W Enterprises, Inc. to Petitions for Reconsideration, WT Docket No. 03-66, filed February 22, 2005, at 4.

above, if IMWED's request were adopted, several of Luxon's leases would be required to be submitted to the Commission.<sup>8</sup>

This result would have dire and unnecessary consequences for new entrants seeking spectrum to provide competition to other broadband providers. First, submitting private agreements to the Commission, especially in unredacted form, would necessarily disclose details about financial terms, deployment schedules, provisioning of services and other sensitive and strategic elements of a lessee's business plan. Competitors – including other EBS/BRS operators, DSL providers and cable operators – would have access to this information and in reliance on such information might selectively target areas or take other actions detrimental to the lessee and the EBS licensee. Of course, EBS licensees and operators do not have the same right to examine their competitors' sensitive business information, creating an uneven playing field if IMWED's scheme is imposed.

Second, the certifications required by FCC Form 603-T and exhibits appended thereto ensure that the licensee complies with its "substantial use" obligations. Although the "substantial use" showing is not required by Commission rules, Commission staff informally requested licensees and lessees to provide the following additional information, which appears in the recently-filed Luxon/GCCC Lease Application:

Pursuant to the Report and Order, the Agreement includes all of the EBS substantive use requirements: (i) the spectrum will be used for educational purposes; (ii) the Lessor retains the right to ready recapture of spectrum for educational purposes when used in analog mode and a 5% (five percent) reservation of transmission capacity for educational purposes when used in digital mode; (iii) the initial lease term does not exceed the term of the license; (iv) the EBS licensee retains ultimate responsibility for compliance with FCC rules regarding station construction and operation; (v) the EBS licensee can file applications for modification; and (vi) the EBS licensee retains the right to acquire the EBS transmission equipment, or comparable equipment, upon termination of the lease agreement.<sup>9</sup>

With the submission of this information, what possible public interest purpose could be realized by requiring unredacted leases to be filed?

Third, there is no evidence in the record to suggest that EBS licensees and lessees have, since January 10, 2005, falsified their certifications or engaged in other activity that would require increased Commission oversight. To the contrary, even the language in

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<sup>8</sup> See *Public Notice*, Report No. 2215, released July 27, 2005, p.12 (accepting for filing an application for approval of *de facto* spectrum transfer leasing arrangement between Luxon and Gulf Coast Community College, File No. 0002241666 ("Luxon/GCCC Lease Application")). Similar applications were filed with respect to leases between Luxon and each of Panhandle Area Educational Consortium and Liberty County School District and are expected to be accepted for filing shortly. Other leases between Luxon and EBS licensees were executed prior to January 10, 2005 and thus are not required to be approved by the Commission.

<sup>9</sup> Luxon/GCCC Lease Application at Exhibit 1.

the Sprint/Clarendon lease to which IMWED objects definitively demonstrates that the parties are cognizant of their regulatory obligations and have drafted language to address them.<sup>10</sup> IMWED can point to no *bona fide* reason why the Commission should reverse its well-reasoned decision and require submission of unredacted leases for public scrutiny.

***Conclusion***

IMWED's attempt to require submission of unredacted leases and the intrusion into the private contractual relationship between EBS licensees and lessees would be inconsistent with the public interest, and thus IMWED's Petition should be summarily dismissed or denied.

Pursuant to Section 1.1206(b)(1) of the Commission's rules, this notice is being filed electronically with the Commission via the Electronic Comment Filing System for inclusion in the public record in WT Docket No. 03-66.

Please contact the undersigned if there are any questions about this notice.

Respectfully submitted,



Brian W. Gortney, II

cc: Fred Campbell  
Barry Ohlson  
John Giusti  
John Branscome  
Catherine Seidel  
Scott Delacourt  
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John Schwartz  
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<sup>10</sup> See WCA Letter at 4-7.